



JOINT ADVISORY ON DESIGNING CONTRACTS FOR PROCESSING OF MUNICIPAL RECYCLABLES

A. PREFACE

For more than a decade, Chinese mills and processors have been the largest buyers of recyclables in the world. Even as commodity pricing fluctuated, recovered materials continued to move to end markets. With its enactment of strict contamination standards and restrictions on certain types of imported materials, China has significantly limited market access and again triggered declines in market revenues, which highlight existing and create new challenges for recycling programs in the United States and Canada.

With this change in the recyclable end markets, North America recycling programs and recycling service providers – both public and private – have begun to re-examine current practices at a foundational level. Potential solutions include upgrading processing systems, reducing contamination, and re-evaluating program guidelines for acceptable materials. These changes, and their chances for success, rest on strong partnerships among the entities that collect materials, those that process materials and the proactive participation of the communities served.

In 2015, NWRA and SWANA issued this joint advisory with the intention of providing professionals throughout the solid waste industry a tool that contributed toward achieving best practices in contracting for recycling processing. As the effect of China's waste import restrictions become increasingly evident on recycling programs and markets around the world, we believe it is appropriate to re-issue the document.

At a time of major and sustained change in a key market and given the uncertain availability of other domestic or foreign markets with the capacity to accept all recyclables previously sent to China, NWRA and SWANA join in reiterating our support for contracts that reflect and accommodate changing market conditions and that address the risks and benefits available to all parties in such agreements.

B. INTRODUCTION

This joint advisory is being issued by the National Waste & Recycling Association (NW&RA) and the Solid Waste Association of North America (SWANA). The purpose of the advisory is to provide both the public and private sector professionals in solid waste management with guidance, protocols and standards regarding contracting for processing of municipal recyclables. As such, the information in this Advisory is primarily focused on situations where recyclables are collected from the residential sector and delivered to a Material Recovery Facility (MRF) for processing and preparation for sale. There may be other circumstances for processing recyclables where the information in this Advisory is also applicable.

This Advisory presents options and considerations to guide the local agency and the contractor on anticipating and managing scenarios that may arise.

A local agency that intends to execute a contract for managing recyclables should consider their options to ensure a competitive marketplace and options to ensure the highest level of service at fair prices. Likewise, a private sector contractor will have interests to ensure the safety of employees, high quality materials are delivered to the MRF for processing to ensure the highest and best use for the materials and to reduce the quantity of materials that is required to be disposed, in order that the contractor makes a fair profit.

The information provided in this Advisory is for general guidance only and not for the purpose of providing legal advice. Public entities should consult with their legal counsel to obtain legal advice with respect to any particular contract, issue or problem. The application and impact of laws can vary widely based on the specific locality and facts involved.

The Changing Waste Stream

The characteristics of the solid waste stream are in flux due to many factors including the increase in use of electronic devices, the decline in the publication of newspapers, more products made using plastic, light-weighting of products, redesign of packaging, increase in online shopping and home delivery, new waste diversion programs, and many other factors. These changes create challenges in the marketplace for defining fair value for both the local agency (municipalities, counties, townships, and other political subdivisions) and the contractor. In addition, the recycling markets can be volatile. Within very short order, prices for commodities can rise or fall significantly.

The Contracting Process

A local agency interested in selecting a service company to manage and process recyclables will need to make decisions on how that process will move forward. Decisions on important topics such as ownership of the recyclables, the type of program used to collect the recyclables, and the services necessary to deliver the recyclables to the processing service company (such as a MRF) must be evaluated in advance of starting the public selection process. After the parameters of the program are determined, the local agency should commence and complete the contracting process in the manner provided by state, provincial or local law, as the case may be, and in consultation with its legal counsel.

C. ESTABLISHING CONTRACT PROCUREMENT PROTOCOLS

One option for public entities to consider is developing a competitive bidding process, which could include one or more of the following:

- Expressions of Interest
- Requests for Qualifications
- Request for Proposals
- Tender

Obtaining Initial Feedback

Prior to releasing a request for proposal or bid documents, the local agency could solicit input through public workshops from the recycling community, local haulers, elected officials and the general public. These workshops could help in defining the scope of work for the services requested and minimize confusion through the proposal/bid process. A pre-bid meeting with potential contractors could also be advertised and follow as part of the procurement process. Any questions, comments or concerns that are raised during this pre-bid meeting can be dealt with through an addendum to the contract.

Contents of Bid Documents

It is recommended that local agencies work with their legal counsel when preparing bid documents. Bid documents should include standard contractual provisions and consider the following for recycling contracts: Fully disclose business risk allocation (e.g. who assumes the risk; or % of risk), who owns the recyclable materials, and those situations that may protect the contractor or procurement agency from breach of contract. Some of these may include:

- changes in law
- labor disturbances
- acts of God, etc.

Very specific definitions need to be included in the bid documents to provide a level playing field for all bidders. Some provisions may be negotiated during the contract negotiations period.

D. PRESCRIBING PERFORMANCE SPECIFICATIONS AND STANDARDS

Contract Documents

The content of the contract is a key element of a successful relationship between the contractor and local agency. The contract should:

- Ensure that the service specifications and standards meet the needs of the identified waste generators (e.g. residents) demands of law realistic processing capabilities and market conditions, as applicable.
- Recognize that the residential recycling stream is dynamic in terms of material types, volume or weight, and value of materials. Careful record keeping and review of this data will help identify changes. Also, audit protocols of the materials should be established, and audits should be performed by the contractor and local agency or an impartial third party to ensure accurate assessments of changes to the collected materials as they arrive at the MRF
- Identify provisions for compensating both parties due to market fluctuations.
- Ensure the local agency and contractor take reasonable steps to promote and ensure the quantity and quality of the recyclable material streams. If there is a third party hauler, then they need to be part of the education of the customers as well.
- Recognize the value of the materials (and the ability to process efficiently) is dependent on the quality of the inbound stream and define acceptable levels of contamination, moisture, and other factors.

Fundamental Contract Provisions

- Contracts should include the following fundamental provisions:

- A well-drafted contract contains definitions of key terms. Pay particular attention to the following words and phrases: “Applicable Law”, “Recyclables”, “Maximum Non -Recyclables Level” (sometimes called contamination rate), “Non-Recyclables”, “Residue”, “Uncontrollable Circumstances” (sometimes called Force Majeure or acts of God)
- Contract term/length, including mutual extension rights/obligations, or a contractor bonus that can be earned through performance
- Specify obligations that survive the term (such as indemnifications, certain reporting requirements, etc.)
- Termination rights, such as cure periods for defaults, no-fault termination for lack of funding, or convenience.
- Local agency’s responsibilities and rights, e.g. (dis)approval rights with respect to key personnel and contract delegation and assignment (including sales, mergers, bankruptcy, transfer of ownership, etc.)
- Contractor’s responsibilities and rights
- Performance specifications and standards (e.g. receiving hours, vehicle tipping/turnaround times, weighing protocols (including scale house operation, fee collection/security), throughput capacity requirements, identification of acceptable materials; hazardous waste load checking protocol (including responsibility/protocol for handling and paying for hazardous wastes and processing residue), and load rejection rights.
- When the contract is for a municipally owned facility: utility consumption guaranties (if local agency pays utility charges), routine and extraordinary maintenance and repair, and replacement of publicly owned equipment and facility.
- Other specifications may include waste composition preconditions and reject limits, recovery guaranties and residue management/disposal, allowable levels of non-recyclables and moisture, marketability guaranties, product specifications, materials marketing obligations (including market risk allocation), performance/recovery incentive(s), recovered materials revenue sharing options, and rebate requirements for materials delivered by haulers to the facility
- Collection service details, such as: type of customers (e.g. residential, commercial, multi-family, institutional, governmental, seniors and), service days and hours, collection method (e.g. containers, trucks, number of sorts), use of alternative fuels
- Public education and outreach program
- Contract administration tools with feedback loops. Record keeping, reporting (performance, operations and financial), responsiveness standards, access to facility and inspection protocols, performance (dis)incentives should be reviewed together on a routine schedule
- Compensation/payment structure. Note: if compensation will include the marketing of the recyclables, material valuations should be taken into account and they should include:
 - agreed upon value for materials sold – actual value or recognized indices
 - what the material is worth at the processing facility, i.e. make allowance for transportation
 - negative values of marketed materials and disposal costs

- tip fees where applicable
- consideration of who assumes responsibility for disposal costs, recognizing that inbound material quality and processing efficiencies affect these costs.
- Adjustments over time to the percentages of each recyclable and non-recyclable component set at the inception of the contract. Adjustments through jointly agreed upon protocols for audits should be done at regular intervals
- Allowances for changes in the contract over time due to such circumstances as: acts of God, changes in market conditions (including but not limited to lack of commercially reasonable market availability for processed recyclables, changes in market specifications affecting the
- salability of recyclables, changes in law (e.g. bottle bills) affecting the recyclability of materials, changes in the quantity, quality or composition of the inbound recyclables). Note: quantities could be affected by the removal of more valuable commodities from the mix or allowance of scavenging, and these issues should be addressed. Any other change which prevents, precludes or substantially affects the benefit(s) bargained for under the agreement (mutually agreed upon by local agency and contractor)
- Compensation adjustment methodologies for any increase or decrease in services or other obligations required of the Contractor due to changes in contract conditions and at time of any contract extensions, such as increases in cost due to mandated wage increases and/or changes in fuel costs.
- Flexibility for the contractor to dispose of recyclables when no reasonable commercial market exists (mutually agreed upon by local agency and contractor pursuant to predetermined standards)
- Defaults, cure periods, and remedies
- Representations and continuing warranties
- Dispute resolution and enforcement options
- Performance assurance (e.g. bonds, letter of credit) where the ability to perform may be in doubt

E. CONCLUSIONS

This Advisory highlights important issues that come into play during a public process to select processing services for recyclables. Contracts should ultimately be designed to ensure that they are functional and cost effective for both public entities and contractors and ensure high quality service that return recyclables to the marketplace as commodities.